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Supreme Court, U.S.
FILED
071146 MAR 7 - 2008
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

KERRY L. MORGAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 7, 2008

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QUESTION PRESENTED

In 1994, about 70 persons were federally licensed to sell firearms in Petitioner's Township. Today, apart from one pawn shop, Petitioner is the last remaining federal firearms licensee (FFL). Nationwide, 79 percent of dealers have simply been eliminated.

The purges began in 1994. Congress adopted legislation that required applicants to certify that their business would conform to local zoning ordinances. But to protect applicants from arbitrary construction of local ordinances, Congress retained its 1986 statutory mandate that a federal court review the entire licensing process *de novo*.

Lower courts, however, have divided into three judicial camps when construing the *de novo* review protection mandated by 18 U.S.C. § 923(f)(3), *i.e., de novo* review means 1) deferential agency review, 2) applying Rule 56 summary judgment criteria, or 3) independent judicial review of the record without any deference to the agency's decision.

One question alone is, therefore, presented:

I. Does Congressionally Mandated *De Novo* Judicial Review under 18 U.S.C. § 923(f)(3), require a District Court to Examine anew the Entire Record and Make an Independent Assessment of the Law, without Attaching Any Presumption of Correctness to the ATF's Decision as to Whether an Applicant has Satisfied the Various Prerequisites for a Federal Firearms License?

PARTIES TO THE PROCEEDING

The Petitioner is Kerry L. Morgan, an individual and attorney.

The Respondent is the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the published Opinion of the United States Court of Appeals for the Sixth Circuit. This case provides an opportunity to instruct District and Circuit Courts in applying the Congressionally mandated *de novo* standard of review when applied to federal firearms licensing procedures under 18 U.S.C. § 923(d) and 18 U.S.C. § 923(f)(3).

PUBLISHED OPINIONS BELOW

The published opinion of the Sixth Circuit Court of Appeals (App. A) is reported at 509 F.3d 273 (6th Cir. 2007). The published Opinion and Order of the District Court (App. B) is reported at 473 F. Supp. 2d 756 (E.D. Mich. 2007).

JURISDICTION

The published Opinion of the Court of Appeals was entered on December 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 923(f)(3) states:

> If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty

days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a *de novo* judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

Title 18 U.S.C. § 923(d) states in relevant part:

(1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

. . .

(F) the applicant certifies that (i) the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premise is located . . . .

STATEMENT OF THE CASE

This case presents a question about what constitutes Congressionally mandated *de novo* judicial review. It arises in the specific context of the ATF's denial of Petitioner's federal firearms license renewal. The jurisdiction of the lower court was originally invoked under 18 U.S.C. § 923(f)(3).

The Sixth Circuit resolved this issue by concluding that a district court may treat review of the ATF's decision based on a highly deferential standard. It held that the district court need inquire no further than to simply determine if the ATF deferred to the interpretation of local law by local officials in determining that the Petitioner was not in compliance with local law and thus ineligible for the license. The Court reasoned that since the Court itself "defers to the state courts and other relevant authorities as to issues of state and local law, the Defendant agency surely should be permitted to do so as well." 509 F.3d at 277. By this logic, the Court likened this scope of review to one of simple deference to agency decision-making. It said as much during oral argument when it analogized *de novo* review to that minimal degree of judicial review accorded in a social security proceeding.

The appellate court treated the specific statutory mandate for judicial *de novo* review in the context of a firearm license proceeding, as if it imposed nothing more than the equivalent of a deferential standard of agency review. This treatment and deference turns a blind eye to the statutorily imposed obligation to provide Petitioner with "a *de novo* judicial review of such denial" as mandated in 18 U.S.C. § 923(f)(3).

The district court also minimized its *de novo* judicial review power under 18 U.S.C. § 923(f)(3). Black's Law Dictionary defines *de novo* review to mean review anew. It further defines *de novo judicial review* to mean a court's "non-deferential" review of an administrative decision through a review of the administrative record. Black's Law Dictionary, (8th ed., 2004).

Yet the district court maintained that it was only required to determine whether the denial of Petitioner's license was "authorized." It should rather have construed "*de novo judicial review*" to mean "non-deferential" independent review of an administrative decision through a review of the administrative record without any deference to the agency or opinion of local officials. Had the district court applied the correct standard, Petitioner's argument regarding the Township's insupportable reading of its own ordinance and the agency's absolute uncritical deference to that reading, would require a different outcome.

I. FACTUAL BACKGROUND

Petitioner has held a federal firearms license as a dealer in Michigan since 1993 at his licensed residential premises in Redford Township, Michigan. Said license authorized Petitioner to conduct business as a Type 01 dealer in firearms from his licensed premises located at his residential address.

A Type 01 dealer is authorized to generally transport, ship and receive long guns and pistols in interstate and foreign commerce. It also entitles a dealer to make retail sales of said firearms to the general public, and keep certain required records of transfers subject to other restrictions not herein applicable. ATF requires a Type 01 dealer to reapply for a license every three years, though no statute requires reapplication.

Petitioner timely sought renewal of his license every three years in 1994, 1997, 2000 and 2003. Petitioner has resided at the same residential location

throughout this period. The ATF's inspectors made an inspection of Petitioner's premises each renewal period. The Township's local zoning ordinance was also unchanged during the relevant periods of this case. Redford Township zoning ordinance permits "accessory uses" on property zoned as R-1 residential. (See Redford Township Zoning Ordinance, § 4.01(D).) The ordinance, in turn, defined "accessory uses" as follows:

> An "accessory use" is a use which is clearly incidental to, customarily found in connection with, and (except in the case of accessory off-street parking spaces or loading) located on the same zoning lot as the principal use to which it is related.

(Id. at § 1.02.) At the time of Petitioner's application, the ordinance listed examples of accessory uses, including "home occupations, consisting of an occupation or profession carried on by not more than one (1) member of the family residing in the residence . . . ." Petitioner consistently maintained that his FFL business fell squarely in this "home business" accessory use. The license was, therefore, renewed in 1994, 1997, and 2000.

On or about June 26, 2003, Petitioner submitted a timely application for renewal of his federal firearms license to the ATF in the usual manner.[1] The ATF

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[1] 18 U.S.C. § 923(d)(1) states in relevant part that an application for a federal firearms dealers license "shall be approved if . . . (F) the applicant certifies that— (i) the business to be conducted

denied the license. The Petitioner then sought review of the administrative denial under 18 U.S.C. §§ 923(f)(1) and (f)(2) which involves a hearing on the denial. A record was made of the hearing which was held on October 27, 2004. A Township official testified that the license was denied because he did not want to live next to a dealer and the Township was thereby justified in sustaining its view that the Petitioner's home business was prohibited by local ordinance.[2]

The hearing was held before a non-lawyer ATF employee. He was not an administrative law judge, nor did he make any binding decision. He subsequently issued a November 26, 2004, report in which he predictably recommended that Petitioner's application be denied. On July 21, 2005, the Detroit area ATF Director of Industry Operations (DIO) who had issued the original decision denying the license, issued a final decision based on the report, denying the Petitioner's licensing renewal application.

The sole reason the ATF advanced for the denial of Petitioner's application is that he could not operate a firearms business from his residence without running afoul of the Township's local zoning ordinance. The

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under the license is not prohibited by State or local law in the place where the licensed premise is located . . . ."

[2] In response to the government's direct examination regarding why the Township regarded Petitioner's business to be contrary to the zoning ordinance, Redford Township Director of Public Works Leo Snage stated that "my position would be I certainly wouldn't want a gun dealer living next door to me." (Hearing Transcript, p. 234, lns. 20-22).

"home business" use of the property had not changed. The ordinance had not changed. What changed was the Township–it became obsessed with eliminating its FFLs. Fortunately, Congress has protected FFLs from the arbitrary and incoherent decisions of local officials by providing *de novo* review of the licensing decision making process.

II. PROCEEDINGS BELOW

A. The District Court

Not satisfied with the result of the administrative hearing, the Petitioner then sought *de novo* judicial review of the Township's decision and Respondent's uncritical deference thereto, in the district court as provided in 18 U.S.C. § 923(f)(3).[3] After some limited discovery, the parties eventually filed cross motions for summary judgment. Responses and Replies were also filed with numerous exhibits attached. After oral argument, the lower court granted the government's motion and denied the Petitioner's cross motion, dismissing his complaint on February 9, 2007. A

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[3] A prior proceeding sought mandamus on the ground that the Defendant agency had failed to act upon his application within the requisite 60-day period. See 18 U.S.C. § 923(d)(2). In an opinion and order dated June 23, 2004, the court granted the agency's motion to dismiss the case as moot, in light of the agency's subsequent (albeit untimely) decision in November of 2003, to deny Plaintiff's application. See Morgan v. United States DOJ, No. 03-74035, 2004 U.S. Dist. LEXIS 30319 (E.D. Mich. June 23, 2004), *aff.*, 04-1933, (Sixth Cir., Dec. 2, 2005), *cert. den.*, 05-1117, (Supreme Court, Apr. 24, 2006).

motion for reconsideration was filed and was subsequently denied.

The court focused on its *de novo* judicial review power under 18 U.S.C. § 923(f)(3). That subsection states:

> If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a *de novo judicial review of such denial or revocation*. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court. (Emphasis added).

Section 923(f)(3) was amended in 1986 to add the word "*de novo*" before "judicial review." Prior to the 1986 amendment, the word "*de novo*" was present in the legislative history, and some courts had interpreted the statute to require *de novo* review,

while others chose to give deference to the decision of the administrative agency. The amended statutory language, however, is clear and unambiguous. The Petitioner is entitled to "*de novo* judicial review of such denial or revocation."

The statutory verbiage that follows this broad scope of review does not diminish or modify its scope. The fact that the statute also says that a court may consider evidence outside the administrative record, does not narrow the scope of review one iota. A court's imposition of a remedy, if its decides that the Attorney General was not authorized to deny the license, is an imposition that occurs *after* the court's review *de novo* is completed. The statute's remedial aspect, however, is not a limit on the scope or nature of *de novo* review itself. It is not a substitute for such review or excuse for not conducting such review.

The lower court, however, took this language and reasoned that the statute really means that the Petitioner is only entitled to a review of whether the Attorney General was "authorized" to deny the license. But this is not what the statute says or what *de novo* review means.[4] The lower court converted the

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[4] This is not the only legal remedy the court devised. It noted that the Petitioner had "legal avenues available to him to challenge the correctness of the opinion produced by Redford Township officials in response to Defendant's inquiry." The court then noted Petitioner had not made "any effort" to purse his state remedies. 473 F. Supp. 2d at 766. Petitioner, however, can find no federal statutory obligation to make "any effort" to convince local officials regarding his legal position as a legal predicate to receiving a license–a license which the Attorney General must issue if the

statute's broad non-deferential *de novo* review standard into a nominal or deferential agency review. It confused the scope of the remedy with the nature of review.

In fact, in construing this section, the lower court simply cut the concept of *de novo* review to ribbons, or as the Petitioner noted in oral argument, "We are making hash of *de novo* review here." The lower court began by noting that "courts have expressed some uncertainty as to the precise nature of the judicial scrutiny called for under § 923(f)(3). While this provision mandates "*de novo*" review, it limits this review to the question whether the denial of an application was 'authorized.'" Morgan v. United States DOJ, 473 F. Supp. 2d 756, 762 (E.D. Mich. 2007).

This limitation, however, is not in the statute. The district court went to great lengths to downsize *non-deferential de novo* review of the "denial or revocation." At the end of the process, the court was left with a deferential review of "whether the denial of an application was authorized." It reasoned that its inquiry was limited to considering whether the Attorney General's revocation was authorized, not whether the lower court would make the same decision if originally presented with the administrative record.

Petitioner argued that Congressionally mandated *de novo* review under 18 U.S.C. § 923(f)(3) required the

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other criteria of 18 U.S.C. § 923(d) are met as they are here. The federal licensing statute simply takes no notice of state remedies as a condition to issuance of a license.

district court below to "independently construe" the local Township zoning ordinance in order to make a wholly independent inquiry as to whether Petitioner satisfied the various prerequisites for renewing a federal firearms license. Petitioner had consistently maintained that his FFL business fell squarely in the ordinance's "home business" accessory use. Yet, the court below held that *de novo* review merely required the district court to only inquire if the "ATF could properly defer to the Township's interpretation of its own ordinance." Once this simplistic inquiry was complete, the district court mechanically concluded that Petitioner did not meet the licensing criteria. 473 F. Supp. 2d at 759. Moreover, the district court refused to critically review the ordinance or consider Petitioner's argument regarding the Township's tortured construction, flatly suggesting that "the concept of 'de novo' review does not confer upon this Court the freestanding authority to decide for itself what a state or local enactment might allow or prohibit." 473 F. Supp. 2d at 765. The Court's review was no review.

As a result, Petitioner's Federal Firearms License, which he has held at the same location under the same local zoning ordinance since 1994 and which the Respondent renewed three times without incident, was wrongfully denied. Had the court applied the correct *de novo* standard, it would have been required to consider Petitioner's argument that the Township's incoherent reading of its own ordinance (and the agency's absolute uncritical deference to that reading), were insupportable as a matter of law and would require a different outcome.

B. The Court of Appeals

Petitioner then filed an appeal which was eventually argued. The actual law was not well received during oral argument as it tended to cloud the issues which seemed important to the court. A December 13, 2007, published opinion subsequently affirmed the district court's published opinion. The Sixth Circuit concluded that a district court may treat review of the ATF's decision based on a deferential standard. It held that the district court need inquire no further than to simply determine if the ATF deferred to the interpretation of local law by local officials in determining that the Petitioner was not in compliance with local law and thus ineligible for the license.

Following the precedent set during oral argument, the court was undeterred by the actual text of the law in its written opinion. It simply reasoned that since the court itself "defers to the state courts and other relevant authorities as to issues of state and local law, the Defendant agency surely should be permitted to do so as well." 509 F.3d at 277. By this anecdotal logic, the court likened its scope of review to one of simple deference to agency decision-making. The appellate court treated the specific statutory mandate for judicial *de novo* review in the context of a firearm license proceeding, as if it imposed nothing more than the equivalent of a deferential standard of agency review.

Moreover, no court showed the slightest concern over which government was actually making the decision on the license–the local or the federal

government. The license is a federal one and its issuance is mandatory if the Applicant satisfies the statutory criteria in 18 U.S.C. § 923(d). Some criteria are objectively verifiable such as age and the applicant's status as a prohibited person. Not so easily verified is the requirement that the Applicant certify that "the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premise is located." The statute says nothing about local officials verifying that certification. It gives them no authority in the licensing scheme. It extends them no veto over the license. They have no jurisdiction. None.

Yet, in cooperation with the ATF and the disinclination of federal courts to provide any actual independent review of the decision-making process according to the statute, the power of local officials over the licensing decision has evolved into the decisive factor. In practice, the written opinion of a local official is virtually unreviewable by a district court if relied upon by the Respondent agency. Thus, local officials who are never mentioned in the statute and have no federal licensing jurisdiction, have nevertheless been endowed with a *de facto*, if not *de jure* veto on the issuance of a federal firearms license. The veto of this local not-so-mythical hydra, is greeted by a district court that claims it has no "authority to decide for itself what a state or local enactment might allow or prohibit." 473 F. Supp. 2d at 765. The Appeals Court fares no better with its simplistic deference to local officials theory.

The result is that the Congressionally mandated scope of *de novo* judicial review is simply no review at

all, and local officials remain gleefully immune from judicial oversight.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the Writ.

I. The Arbitrary Denial of a Federal Firearms License Application by Local Officials Without *De Novo* Judicial Review Makes a Sham of the Right of Individuals to Lawfully Purchase Firearms and, as may be determined in District of Columbia v. Heller, to Keep Such Firearms in their Homes.

On November 20, 2007, this Court granted certiorari in District of Columbia v. Heller, No. 07-290. The question to be decided in that case asks whether certain provisions of the D.C. Code violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

While resolution of this question is critical to Second Amendment jurisprudence, the stark reality is that in 1993 there were 55 licensed firearm dealers in the District. By 1997, that number had been reduced to only 11.[5] Today there are only *six licensed firearm*

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[5] Commerce in Firearms in the United States, Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, February, 2000, p. 15.

dealers in the District of Columbia from whom an individual could lawfully purchase any such "handguns and other firearms."[6] Six FFL's cannot service a 2006 estimated population of 581,530 persons.[7] What then is the practical value of an individual right to own, keep or bear a firearm "in their home"? If Heller affirms that District residents, and indeed Americans, enjoy an individual Second Amendment right to possess a firearm, but there are few or no federally licensed firearms dealers in their respective communities, how then can they lawfully buy a handgun or other firearm? And if they cannot lawfully buy a handgun or other firearm locally, or they must wait in line for months on end, then local governments can turn this important Constitutional right into a farce.

Yet, not only in the District of Columbia but in every state in this country, the number of federally licensed firearm dealers has been slashed. Along with this reduction, the ability of an individual to lawfully purchase a firearm from an FFL dealer is also impaired. According to the Violence Policy Center, since 1994, more than 80 percent of FFLs in Washington, Louisiana and Georgia were eliminated. Florida FFL's fell 87 percent. The Center estimates

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[6] See http://getffl.com/DC/

[7] See U.S. Census Quick Facts at http://quickfacts.census/gov/qfd/states/11000.html

that licensed dealers fell an average of 79 percent nationwide.[8]

In Petitioner's Township, there were approximately 70 FFLs in 1994. Petitioner is the last remaining non-pawn FFL. Local officials have boasted how they drove all the others out of business through the licensing process without any fear of judicial oversight. One FFL cannot service a Township with a 2000 census population of 51,622 persons. Purchasers must now travel to another community to lawfully purchase a firearm.

In 1994, Congress required FFL applicants to certify that their business would conform to local zoning ordinances. But to protect applicants and licensees from arbitrary or unreasoned construction of local ordinances at the hands of misguided or intolerant local officials, Congress retained the statutory mandate that a federal court review the entire licensing process *de novo*.

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[8] Inspection of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives, Report Number I-2004-005, Department of Justice, Office of Inspector General, p. 2, July 2004. In 1994 there were about 245,000 United States residents federally licensed to sell firearms in 1994. Though exact numbers are hard to come by, today that number has been cut to around 104,000 licensees. http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf

The Violence Policy Center, however, estimates that the number or Type 01 licensees in particular has been reduced to 50,630, a 79 percent reduction nationwide. See An Analysis of the Decline in Gun Dealers: 1994 to 2007, Violence Policy Center, p. 3, August 2007. http://www.vpc.org/studies/dealers07.pdf

The approach of federal district courts, however, in refusing to apply *de novo* review to licensing cases has opened the door for local officials to arbitrarily bar new licensees and shut down current license renewals on a nationwide basis without the slightest concern of judicial restraint. The instant case is but one example of this refusal. The published opinions of both the district and appellate courts are testaments to the judiciary's refusal or failure to protect licensees from local anti-gun prejudice masquerading as official decision-making.

This Court has already granted certiorari in Heller. It is, therefore, reasonable to conclude that this Court deems the Constitutionally enumerated Second Amendment right of an individual to be worth considering and perhaps preserving. Yet that individual right cannot be logically or practically preserved without also granting certiorari in the instant case.

If the individual constitutional right is preserved in Heller, but protection for dealers is judicially conceded to the arbitrary dictates of local officials on a nationwide basis, then the right to possess "handguns and other firearms" in the home or elsewhere, will not be worth the paper upon which it is printed.

II. Lower Federal Courts Have Been Inconsistent in Applying Congressionally Mandated *De Novo* Review.

A. Summary of Lower Court Approaches to 18 U.S.C. § 923(f)(3) *De Novo* Review.

There are three judicial camps construing 18 U.S.C. § 923(f)(3): 1) deferential agency review, 2) equating *de novo* review with Rule 56 summary judgment criteria, and 3) independent judicial review of the record without any deference to the agency's decision.

The First and Third Circuit courts have not addressed this issue. Nor have any district courts in these Circuits issued published opinions which Petitioner can identify. The Second, Fifth and Tenth Circuit courts have not directly addressed this issue, but their respective district courts have weighed in on the subject.

A district court in the Second Circuit reads 18 U.S.C. § 923(f)(3) to only give a district court authority to reverse the Attorney General if it finds that the Attorney General was not authorized to revoke license. This view is also held by the Sixth, Seventh and perhaps the Ninth Circuit Courts. This is the most deferential standard and entirely inconsistent with the statute.

The Fourth, Eighth, Ninth in part, and a district court in the Tenth Circuit, follow the practice of equating or subsuming 18 U.S.C. § 923(f)(3) *de novo*

review with or into the standard applicable under Fed. R. Civ. P. 56) in regard to summary judgment.

A district court in the Fifth, and the Eleventh Circuit itself have taken the most independent approach which is consistent with the statute and which Petitioner urges here. Applying 18 U.S.C. § 923(f)(3) *de novo* review, requires that the court "will examine the entire record, and will make an independent assessment of the law." Employing this *de novo* standard of review does not result in attaching any presumption of correctness to the ATF's decision.

B. Analysis of Lower Court Decisions.

The First and Third Circuit courts have not addressed this issue and are unlikely to do so as no lower court published cases on point in those Circuits were identified. The Second, Fifth and Tenth Circuit courts have not directly ruled on the meaning of 18 U.S.C. § 923(f)(3) *de novo* review, but lower courts in those jurisdictions have published opinions regarding same.

In a district court case from the Second Circuit, the rule is that 18 U.S.C. § 923(f)(3) only gives a district court authority to reverse the Attorney General if it finds that the Attorney General was not authorized to revoke license. E&B Sporting Goods v. McCarron, 2006 U.S. Dist. LEXIS 8076, 11-12 (D. Conn. 2006).

The Fourth Circuit appears to follow the practice of equating or subsuming 18 U.S.C. § 923(f)(3) *de novo* review with or into the standard applicable under Fed.

R. Civ. P. 56) in regard to summary judgment. RSM v. Herbert, 466 F.3d 316, 319 (4th Cir. 2006).

In a district court case from the Fifth Circuit, the court likened 18 U.S.C. § 923(f)(3) *de novo* review to review of a magistrate judge's proposed findings and recommendations to which objection is made, pursuant to 28 U.S.C. § 636. Citing United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989), the district court observed that this statute requires a district judge to make his or her own determination based upon the record and unrestrained by the findings and conclusions of the magistrate. Applying that standard to 18 U.S.C. § 923(f)(3) *de novo* review, requires that the court "will examine the entire record, and will make an independent assessment of the law." Strong v. United States, 422 F. Supp. 2d 712, 719 (D. Tex. 2006).

The Sixth Circuit court limits *de novo* judicial review to deciding only whether the Attorney General's decision was not "authorized." Morgan v. Fed. Bureau of Alcohol, Tobacco & Firearms, 509 F.3d 273, 276 (6th Cir. 2007).

So too, in the Seventh Circuit where the Court concluded that it may only determine whether the Secretary of the Treasury's decision is "authorized." Stein's, Inc. v. Blumenthal, 649 F.2d 463, 466 (7th Cir. 1980).

The Eighth Circuit has followed the summary judgment under a Rule 56 standard allowing a district court to grant summary judgment when reviewing a firearms-license revocation pursuant to 18 U.S.C.

§ 923(f)(3), provided no issues of material fact are in dispute. On Target Sporting Goods, Inc. v. AG of the United States, 472 F.3d 572, 575 (8th Cir. 2007); see also Sturdy v. Bentsen, 1997 U.S. App. LEXIS 27671 (8th Cir. 1997)[unpublished].

The Ninth Circuit seems to have adopted a hybrid approach invoking the Stein standard, *i.e.,* was the decision "authorized", Perri v. Department of Treasury, BATF, 637 F.2d 1332 (9th Cir. 1981), but also following the Fourth and Eighth Circuit court's resolution of cases on summary judgment principles. Cucchiara v. Sec'y of Treasury, 652 F.2d 28 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S. Ct. 1448, 71 L. Ed. 2d 662 (1982).

A district court in the Tenth Circuit has followed the summary judgment under a Rule 56 standard, allowing a district court to grant summary judgment when reviewing a firearms-license revocation pursuant to 18 U.S.C. § 923(f)(3), provided no issues of material fact are in dispute. Harrison v. United States ex rel. Dep't of the Treasury, 2006 U.S. Dist. LEXIS 82348, 2-3 (E.D. Okla. 2006).

The Eleventh Circuit has held to a non-deferential standard to the effect that a district court employing a *de novo* standard of review should not attach any presumption of correctness to the ATF's decision; however, a court may give the ATF's determination as much weight as the court deems appropriate. Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 348 F. Supp. 2d 1299, 1306 (S.D.Ala. 2004), aff'd 415 F.3d 1274 (11th Cir. 2005).

III. Congress Mandated *De Novo Judicial Review* of the Firearm Licensing Decision-making Process for the Compelling Reason that the ATF's "Administrative Hearing" Is Nothing More than another Internal Agency Procedure, Void of any Independent Judicial or Quasi-judicial Review.

As previously noted, despite the fact that the ATF renewed Petitioner's license in 1994, 1997 and 2000, the ATF's Director of Industry Operations (DIO) denied the license finding that "dealing in Firearms from your premises would be in violation of local zoning laws" contrary to 18 U.S.C. § 923(d)(1)(F)(i) and 27 C.F.R. § 478.47 (b)(6). Petitioner appealed and an ATF controlled "administrative hearing" was held before a non-lawyer and ATF employee. He was not an administrative law judge, nor did he write any binding decision. Though the proceeding had the appearance of a legal proceeding, the Hearing Officer's authority was limited to simply issuing a report on the proceeding with his recommendations. That report was issued on November 26, 2004, and predictably recommended that Petitioner's application be denied.

The Hearing Officer (himself an ATF official) affirmed the Notice of Denial, finding by rote that "dealing in Firearms from your premises would be in violation of local zoning laws." The report and recommendation went to the Detroit area ATF DIO. The DIO, however, was the same person that had issued the original decision denying the license. On July 21, 2005, the DIO issued a final decision based on the report, denying the Petitioner's renewal

application. It is remarkable that this entire process can be called an "appeal" or "hearing" with a straight face.

The ATF's "Final Notice" of denial, however, went well beyond the single issue in the hearing. Without so much as a notice or opportunity to be heard provided to the Petitioner, the ATF summarily decided *after the hearing,* to also find that "the Applicant has been plainly indifferent to and in many instances has acted in purposeful disregard" of the requirements imposed upon a Federal firearms licensee. Throwing in the kitchen sink, the ATF added the calculated finding that the Plaintiff had therefore "willfully and knowingly conducted a business he knows to be in direct conflict with local provisions." A finding of willfulness constitutes an additional basis upon which to deny a license.[9] The ATF neglected to mention in its computer generated summary finding of guilt that it had approved renewal in 1994, 1997 and 2000, and that neither Petitioner's "willfulness" nor past business conduct were ever at issue.

The fundamental elements of procedural due process are notice and an opportunity to be heard. U.S.

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[9] Title 18 U.S.C. § 923 (d)(1) states that any application submitted under subsection (a) or (b) of this section shall be approved if:

> (c) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;
>
> (d) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application.

Const.Amend. 5. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). The Respondent incorporated these notions of due process in 27 C.F.R. § 478.71. "Whenever the Director of Industry Operations has reason to believe that an applicant is not qualified to receive a license under the provisions of §478.47, he may issue a notice of denial, on Form 4498, to the applicant. The notice shall set forth the matters of fact and law relied upon in determining that the application should be denied."

To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case, i.e., "the matters of fact and law relied upon." Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir.1971). Additionally, "an agency may not change theories in midstream without giving a respondent reasonable notice of the change." Id. (*quoting* Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256 (D.C.Cir.1968)). *See also* Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (6th Cir.1992)[To satisfy requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with its case.]

Thus, the administrative hearing never gave the Petitioner any prior notice of a possible willfulness issue. Petitioner obviously raised this due process violation before the district court, but at that point the government withdrew its finding of willfulness leaving the district court little to act upon. See 473 F. Supp. 2d 756, 772-774 (E.D. Mich. 2007).

Nevertheless, the point is that such abuses deserve *de novo* review because the agency's review is itself not an independent one. The entire structure of the agency licensing appeal process is authentically mendacious. The particular example of the ATF's violation of Petitioner's due process rights only underscores the Congressional wisdom of mandating *de novo* judicial review of such proceedings.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

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Dated: March 7, 2008

APPENDIX

APPENDIX A

PUBLISHED SIXTH CIRCUIT OPINION, 509 F.3d 273 (6th Cir. 2007)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-1358

[Filed December 13, 2007]

KERRY L. MORGAN,
Plaintiff-Appellant,

v.

FEDERAL BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 05-73373—Gerald E. Rosen, District Judge.

Argued: November 27, 2007
Decided and Filed: December 13, 2007

Before: MARTIN, SILER, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Kerry L. Morgan, PENTIUK, COUVREUR & KOBILJAK, Wyandotte, Michigan, for Appellant. Derri T. Thomas, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:** Kerry L. Morgan, PENTIUK, COUVREUR & KOBILJAK, Wyandotte, Michigan, for Appellant. Derri T. Thomas, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

OPINION

ROGERS, Circuit Judge. Plaintiff Kerry Morgan appeals the district court's grant of summary judgment in favor of the defendant, the Bureau of Alcohol, Tobacco and Firearms. Mr. Morgan, who deals in firearms from his residential premises in Redford Township, Michigan, applied in 2003 for a renewal of his federal firearms license. Based on an opinion of the Township's legal counsel that Morgan's firearms business violated Redford zoning regulations, ATF denied his renewal application. Morgan filed a petition for judicial review of ATF's final denial pursuant to 18 U.S.C. § 923(f)(3), and the district court granted ATF's motion for summary judgment. Because ATF properly relied on Redford Township's interpretation of its own zoning laws in denying Morgan's federal firearms license, and because Morgan has presented no genuine issue of material fact, we affirm the district court's grant of summary judgment.

Morgan first obtained a federal firearms license in 1993, authorizing him to deal in firearms from his Sumner Avenue home in Redford Township, Michigan.

This location, which Morgan identified on his license application as the relevant "business address," is a single-family residence classified as "residential" under Redford Township zoning regulations.

Morgan timely sought renewal of his firearms license every three years, as required by federal regulations. *See* 27 C.F.R. §§ 478.45, 478.49. Beginning in 1994, applicants for new or renewed firearms licenses were required to certify that "the business to be conducted under the license is not prohibited by State or local law." 18 U.S.C. § 923(d)(1)(F). Morgan signed the appropriate Certificate of Compliance with State and Local Law for each renewal application. During the course of his renewals, the Bureau of Alcohol, Tobacco and Firearms began to express concerns that Morgan's operation of a firearms business out of his home might violate local Redford Township zoning laws. ATF nevertheless renewed Morgan's firearms license in 1994, 1997, and 2000. Apparently troubled by ATF's concern that his firearms business may violate local zoning law, Morgan secured an opinion letter from a local attorney in 1994 stating that his firearms business was a permissible home occupation within the meaning of Redford Township zoning regulations.

When Morgan applied for a license renewal in 2003, however, ATF inspector Gail Sullivan sought and obtained a written opinion from Redford Township's legal counsel regarding Morgan's compliance with local zoning laws. Through its counsel, the Township determined that Morgan's operation of a firearms business from his home in a residential district was not permitted under the town's zoning ordinance.

Based on this information, Ms. Sullivan recommended that Morgan's request for a license renewal be denied, and ATF notified Morgan that his license would not be renewed because "the business to be conducted under the license would not comply with state and local law."

Morgan timely requested an administrative hearing to review the denial pursuant to 18 U.S.C. § 923(f)(2). Following a hearing on October 27, 2004, the hearing officer issued a report in which he recommended that Morgan's application be denied. ATF issued its final decision denying Morgan's renewal application on July 21, 2005.

Morgan sought *de novo* judicial review of ATF's decision pursuant to 18 U.S.C. § 923(f)(3). The district court granted ATF's motion for summary judgment, concluding that ATF's reliance on Redford Township's interpretation of local zoning law was an appropriate basis for denying Morgan's renewal application.[1] *See Morgan v. United States Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives*, 473 F. Supp. 2d 756 (E.D. Mich. 2007). The court noted and rejected Morgan's argument that *de novo* review required the district court to "independently construe local zoning law" in order to make a "wholly independent inquiry whether he has satisfied the various prerequisites for license renewal. . . ." *Id.* at 765. The court explained that even if it were to assess Morgan's renewal entitlement without reference to the agency's decision, the court would reach the same result, citing the

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[1] The district court addressed various other claims and theories raised by Morgan, none of which are at issue on appeal.

traditional federalism principle that, in ruling on matters of state law, federal courts defer to the decisions of the state's highest court and generally follow the decisions of inferior state courts unless convinced that the state's highest court would rule otherwise. *Id.* The court concluded:

> Thus, the concept of "de novo" review does not confer upon this Court the freestanding authority to decide for itself what a state or local enactment might allow or prohibit. Rather, as a starting point, at least, the Court would consult the very same source that the Defendant agency looked to in this case—namely, the local authorities.

Id.

Turning to the question of whether ATF proceeded appropriately in denying Morgan's renewal application on the basis of his lack of compliance with local law, the court noted that ATF has a duty to investigate whether an applicant has established entitlement to a federal firearms license by satisfying the statutory criteria, and reasoned that this duty includes ensuring the truthfulness of statements made on the applicant's firearms license. *Id.* at 763 (citing 27 C.F.R. § 478.47(a) and *Fattahi v. Bureau of Alcohol, Tobacco & Firearms*, 195 F. Supp. 2d 745, 747 n.5 (E.D. Va. 2002), *aff'd*, 328 F.3d 176 (4th Cir. 2003)). The court again rejected Morgan's contention that ATF must "independently analyze and 'confirm . . . the accuracy' of a local government official's interpretation of local law," explaining that, even assuming that no deference had to be accorded to ATF's reasoning, ATF could

properly defer to the Township's interpretation of its own ordinance. "Just as this Court defers to the state courts and other relevant authorities as to issues of state and local law, the Defendant agency surely should be permitted to do so as well." *Id.* at 765-66. Finding no basis for the conclusion that ATF's chosen method of ascertaining the meaning of the Township's zoning ordinance was "unauthorized" or improper, the district court granted ATF's motion for summary judgment.

Morgan filed a motion for reconsideration, which the district court subsequently denied. Morgan now appeals, arguing that the district court erroneously applied a deferential standard of review instead of the statutorily mandated "de novo" judicial review, which, he argues, requires the district court to conduct an analysis of whether he is entitled to a license renewal without deference to the decision of ATF. Morgan suggests that, "[h]ad the Court applied the correct standard, [his] argument regarding the Township's insupportable reading of its own ordinance and the agency's absolute uncritical deference to that reading, would require a different outcome by the lower court." Appellant's Br. 6. Morgan also argues that the court erred in requiring him to establish compliance with local zoning law to obtain license renewal, in light of Morgan's interpretation of § 923(d)(1)(F) as providing a grace period for coming into compliance.

ATF appropriately relied on Redford Township's interpretation of its own zoning laws in denying Morgan's federal firearms license, and Morgan has presented no genuine issue of material fact by which

he may avoid summary judgment. We therefore affirm the decision of the district court.

Although Morgan argues that the district judge accorded undue deference to ATF in light of the statutory requirement of *de novo* review, resolution of that issue is not necessary to decide this case. Assuming, without deciding, that Morgan is correct that 18 U.S.C. § 923(f)(3) requires the reviewing court to conduct "'non-deferential' review of [ATF's] decision through a review of the administrative record," we independently agree with the district court's conclusion that ATF properly denied Morgan's license renewal and is entitled to summary judgment.

To the extent Morgan argues that ATF and the federal courts are obligated independently to construe and interpret the meaning of local law, without regard to the locality's interpretation of its own law, this argument lacks merit for the reasons given by the district court. *See Morgan*, 473 F. Supp. 2d at 765-66. As the district court explained, ATF's deference to local officials was entirely appropriate in determining that Morgan is not in compliance with local law: "Just as this Court defers to the state courts and other relevant authorities as to issues of state and local law, the Defendant agency surely should be permitted to do so as well." *Id.* Of course, the Township legal opinion upon which ATF relied is not as authoritative as a state court ruling. As the district court noted, however, Morgan has failed to offer a superior method of ascertaining the meaning of Redford Township's zoning ordinance that does not involve requiring federal courts and agencies to second-guess state and local interpretations of state and local law. Because,

under the present circumstances, deferring to Redford Township's interpretation of its own law is the most appropriate way of ascertaining whether or not Morgan is in compliance with local law as required by § 923(d)(1)(F), ATF's decision to deny Morgan's license renewal would properly be affirmed under any standard of review, whether *de novo* or more deferential.

Moreover, the district court's grant of summary judgment was proper notwithstanding Morgan's novel interpretation of § 923(d)(1)(F). Morgan argues that the district court erred in construing § 923(d)(1)(F)(i) & (ii) as two separate requirements, requiring him both: (i) to be in compliance with local law at the time license renewal is sought, and (ii) to certify that he *will be* in compliance within thirty days after the application is approved and that business will not be conducted under the license until local requirements have been met. Morgan contends that (F)(i) and (F)(ii) should instead be read as alternatives, requiring him either to be in compliance at the time renewal is sought *or* to certify that he will be in compliance within thirty days. Morgan presented this argument for the first time in his motion for reconsideration, however, and the parties did not have an opportunity to brief the issue. Thus, Morgan did not preserve this issue for appeal, and the court will not entertain it. *See Am. Meat Inst. v. Pridgeon*, 724 F.2d 45, 47 (6th Cir. 1984); *Thurman v. Yellow Freight Sys., Inc.*, 97 F.3d 833, 835 (6th Cir. 1996); *Amway Distrib. Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390-91 (6th Cir. 2003).

For the foregoing reasons, the district court's grant of summary judgment to ATF is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-1358

[Filed December 13, 2007]

KERRY L. MORGAN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDERAL BUREAU OF ALCOHOL,	)
TOBACCO & FIREARMS,	)
Defendant-Appellee.	)
	)

Before: MARTIN, SILER, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment to defendant Federal Bureau of Alcohol, Tobacco & Firearms is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

PUBLISHED DISTRICT COURT OPINION AND ORDER, 473 F. Supp. 2d 756 (E.D. Mich. 2007)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-73373

[Filed Feburary 9, 2007]

KERRY L. MORGAN,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES,
Defendant.

OPINION AND ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on February 9, 2007

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Plaintiff commenced this action in this Court on August 31, 2005, seeking review of a decision by the Defendant United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives ("BATF") denying Plaintiff's application for renewal of his federal firearms license. This denial was based, at least primarily, upon the ground that dealing in firearms from Plaintiff's home in Redford Township, Michigan would be prohibited by the Township's zoning laws. Plaintiff now requests "de novo judicial review" of this decision, leaving this Court with the task of determining whether "the Attorney General was . . . authorized to deny [Plaintiff's] application" for the renewal of his license. 18 U.S.C. § 923(f)(3).

Through the present cross-motions filed on May 8, 2006, both parties seek summary judgment in their favor. The parties largely agree on the operative facts, but disagree as to: (i) whether the Defendant agency properly deferred to the views of Redford Township officials regarding the correct interpretation of the relevant Township zoning ordinance, or instead should have undertaken an independent analysis of the meaning of this ordinance; (ii) whether the ordinance as interpreted by Township officials is preempted by a Michigan statute that limits the authority of local governments to regulate firearms, *see* Mich. Comp. Laws § 123.1102; and (iii) whether the Defendant agency impermissibly changed the basis for its denial

of Plaintiff's renewal application, and thereby violated his right to due process.

These cross-motions have been fully briefed by the parties, and the Court heard oral argument on these motions on November 30, 2006. Having reviewed the parties' briefs, the accompanying exhibits, and the record as a whole, and having considered the arguments of counsel at the November 30 hearing,[1] the Court now is prepared to rule on the parties' cross-motions. This opinion and order sets forth the Court's rulings.

II. FACTUAL BACKGROUND

Plaintiff Kerry L. Morgan first obtained a federal firearms license ("FFL") in 1993, authorizing him to deal in firearms from the premises at 20601 Sumner in Redford Township, Michigan. This location, identified as the relevant "business address" on Plaintiff's FFL application, (*see* Admin. Record at 45), is a single-family home where Plaintiff lives with his wife and children, and the area in which it is located is classified by Redford Township as "residential."

In 1994, 1997, and 2000, Plaintiff timely applied for renewal of his FFL.[2] On each occasion, Plaintiff filed the requisite certification stating that "[t]he business to be conducted under [his] Federal Firearms License

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[1] Plaintiff, an attorney, is representing himself in this case.

[2] Under the pertinent federal regulation, FFLs must be renewed every three years. *See* 27 C.F.R. § 478.49.

is not prohibited by State or local law at the premises shown on" his FFL application. (*See* Admin. Record at 56, 76, 87.) In each instance, the Defendant agency approved Plaintiff's application and renewed his license.

Over the course of this period, however, BATF officials began to express concerns that Plaintiff's operation of a firearms business out of his home might violate local Redford Township zoning laws, at least as these laws were interpreted by Township officials. In early 1995, for example, BATF inspector Stephen O. Patrick met with Plaintiff and informed him of his conversations with Leo Snage, the Redford Township Director of Public Services, and other Township officials who had opined that a firearms business would not be allowed in an R-1 residential area. (*See* Admin. Record at 60.) In apparent anticipation of this potential concern, Plaintiff secured an October 13, 1994 opinion letter from an attorney, Randall A. Pentiuk, stating that Plaintiff's operation of a firearms business was a permissible "home occupation" within the meaning of the pertinent Redford Township zoning ordinance, and that any contrary construction of this local zoning ordinance would run afoul of state law. (*See id.* at 63-65.)

During this same period, Plaintiff also sought a written opinion from the Township's counsel in support of the Township's apparent position that "the operation of a Class I Federal Firearms License from a Township residence is contrary to the Township's zoning ordinance," (*id.* at 66), but he apparently was unsuccessful in this effort. Similarly, Plaintiff wrote to the Township supervisor and board of trustees on

January 22, 1995, complaining that Leo Snage and the Township's counsel had arrived at and voiced their opinions regarding the proper meaning of the Township's zoning ordinance without engaging in "any written legal analysis," informing these Township officials that he had obtained a contrary legal opinion on this subject, and stating that he had "advised the BATF that the Township is in error." (*Id.* at 103.) Notwithstanding the apparently divergent views of Plaintiff and Redford Township officials regarding this matter, and notwithstanding the opinions of at least some federal officials that Plaintiff's operation of a firearms business from his home was prohibited by local law, (*see id.* at 60-61, 97), the BATF approved Plaintiff's 1994, 1997, and 2000 renewal applications.[3]

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[3] In his submissions to the Court, Plaintiff opines that these BATF approvals reflected the agency's legal determination that Plaintiff's reading of Redford Township zoning law was correct. In support of this assertion, Plaintiff cites a terse single-page June 16, 1995 BATF memo in which a recommended denial of Plaintiff's 1994 application was reversed following a "[c]ounsel's review" that found "no basis to deny the renewal of this firearms license at this time." (*Id.* at 75.) The Defendant agency disputes this reading of the June 16, 1995 memo, however, citing testimony at the recent administrative hearing that this memo most likely was meant to reflect the absence of a ***written*** statement from any Redford Township official that Plaintiff's operation of a firearms business from his home violated local zoning law. (*See id.* at 178-80.)

The Court finds it unnecessary to weigh in on this dispute. As noted by Defendant, Plaintiff has not cited any authority for the proposition that the BATF would somehow be "estopped" from denying Plaintiff's most recent application for renewal of his FFL because of any one-time agency opinion that his firearms business complied with local law. Rather, any such opinion would at most

Plaintiff did not enjoy similar success, however, with his most recent renewal effort in 2003. In this instance, BATF inspector Gail E. Sullivan sought and obtained a written opinion from Redford Township counsel that Plaintiff's operation of a firearms business from a home in a residential district was not a permitted use under the Township's zoning ordinance. (*See* Admin. Record at 99-102.) Accordingly, Inspector Sullivan recommended that Plaintiff's renewal application be denied, (*see id.* at 96-98), and the agency issued a Notice of Denial on November 24, 2003, stating that "[o]ur investigation reveals that dealing in Firearms from your premises would be in violation of local zoning laws," (*see id.* at 10-11).[4]

On December 1, 2003, Plaintiff timely requested an administrative hearing to review the denial of his application to renew his FFL. *See* 18 U.S.C. § 923(f)(2).

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be merely probative evidence as to the proper interpretation of Redford Township zoning law. The relevance of this issue is addressed below.

[4] While Plaintiff's application for renewal was pending, he brought a mandamus action in this Court on the ground that the Defendant agency had failed to act upon his application within the requisite 60-day period. *See* 18 U.S.C. § 923(d)(2). In an opinion and order dated June 23, 2004, the Court granted the agency's motion to dismiss the case as moot, in light of the agency's subsequent (albeit untimely) decision in November of 2003 to deny Plaintiff's application. *See Morgan v. United States Dep't of Justice*, No. 03-74035 (E.D. Mich. June 23, 2004). This ruling was affirmed on appeal, and the Supreme Court recently denied Plaintiff's petition for a writ of certiorari.

Following a hearing on October 27, 2004, at which the parties introduced documentary evidence and the Defendant agency offered the testimony of several witnesses, Hearing Officer Mark A. Banas issued a November 26, 2004 report in which he recommended that Plaintiff's application be denied. (*See* Admin. Record at 106-110.) On July 21, 2005, the BATF issued its final decision denying Plaintiff's application to renew his FFL. (*See id.* at 112-18.) This suit followed on August 31, 2005, with Plaintiff seeking judicial review of the agency's adverse determination.

III. ANALYSIS

A. The Standards Governing the Parties' Cross-Motions

Through the present cross-motions, each side seeks summary judgment in its favor as to the validity of the Defendant agency's decision to deny Plaintiff's application for renewal of his federal firearms license. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As evidenced by their cross-motions, the parties agree that this case is amenable to disposition via summary judgment, and their points of disagreement concern purely legal issues that the Court properly may resolve as a matter of law.

The statutory provision under which Plaintiff has brought this action, 18 U.S.C. § 923(f)(3), provides for

"de novo judicial review" of the denial of an application for a federal firearms license. In conducting this review, the Court's task is to determine whether "the Attorney General was . . . authorized to deny the application" under the standards governing federal firearms licensing. 18 U.S.C. § 923(f)(3). The Court need not confine its review solely to the record compiled during the underlying administrative hearing, but instead "may consider any evidence submitted by the parties to the proceeding." 18 U.S.C. § 923(f)(3). Yet, because the statute is permissive, stating only that the Court "may" consider additional evidence, a "trial de novo" is not required in every case, and the district courts instead have "the discretion to receive additional evidence to be considered along with that in the administrative record when some good reason to do so either appears in the administrative record or is presented by the party petitioning for judicial review." *Stein's Inc. v. Blumenthal*, 649 F.2d 463, 466 (7th Cir. 1980) (citation and footnote omitted).[5]

The courts have expressed some uncertainty as to the precise nature of the judicial scrutiny called for under § 923(f)(3). While this provision mandates "de novo" review, it limits this review to the question whether the denial of an application was "authorized."

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[5] In this case, the parties have submitted very little evidence that lies outside of the administrative record. Upon reviewing these supplemental materials, the Court finds that they have little, if any, bearing upon the proper disposition of the legal issues presented in this case, but at most tend to shed further light on the arguments advanced by the parties.

The courts have construed the former language as meaning that the decision under review "is not necessarily clothed with any presumption of correctness or other advantage," but that the Attorney General's findings should only be given "such weight as [the court] believes they deserve in light of the evidence in the administrative record and the evidence, if any, the district court receives to supplement that record." *Stein's Inc.*, 649 F.2d at 466-67 (internal quotation marks, alteration, and citation omitted); *see also 3 Bridges, Inc. v. United States*, 216 F. Supp.2d 655, 657 (E.D. Ky. 2002); *Cisewski v. Department of Treasury*, 773 F. Supp. 148, 150 (E.D. Wisc. 1991). Yet, by confining a court's inquiry to the narrow question whether the Attorney General's decision was "authorized," § 923(f)(3) "does not call upon this Court to decide whether it would revoke the license in it[]s own judgment, but whether all of the evidence presented is sufficient to justify the Attorney General's revocation of the license." *Pinion Enterprises, Inc. v. Ashcroft*, 371 F. Supp.2d 1311, 1315 (N.D. Ala. 2005); *see also Procaccio v. Lambert*, No. 5:05-MC-0083, 2006 WL 2090166, at *2 (N.D. Ohio July 25, 2006) ("[T]he Court considers whether the Attorney General's revocation was authorized, not whether this Court would make the same decision if originally presented with the issue."); *Francis v. United States Bureau of Alcohol, Tobacco & Firearms*, No. 05-380-RAW, 2006 WL 1047026, at *2-*3 (E.D. Okla. Apr. 20, 2006) (emphasizing that the standard of review under § 923(f)(3) "is quite narrow").

B. The Defendant Agency Appropriately Sought and Deferred to the Opinions of Redford Township Officials in Determining Whether Plaintiff's Operation of a Firearms Business Violated the Township's Zoning Laws.

In denying Plaintiff's application for renewal of his FFL, the Defendant agency determined that Plaintiff's operation of a firearms business from his Redford Township home would violate the Township's zoning laws as construed by Township officials.[6] Through his present motion, Plaintiff contends that this interpretation of Redford Township's zoning ordinance is incorrect as a matter of law. The Court agrees with Defendant, however, that no independent construction of local zoning law is called for here, whether by the agency or by this Court, and that Defendant acted within its statutory authority by seeking and deferring to the opinions of local officials on this issue.

Under the pertinent statutory provision, an application for an FFL "shall be approved" if the applicant satisfies a number of requirements. 18 U.S.C. § 923(d)(1). Of particular relevance here, the applicant must "certif[y] that . . . the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premises is located." 18 U.S.C. § 923(d)(1)(F)(i). In light of this statutory requirement, the Defendant agency has

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[6] Defendant's final decision appears to suggest an additional ground for denying Plaintiff's application, beyond the determination that his firearms business did not comply with local law. The significance of this additional finding is addressed below.

developed and promulgated ATF Form 5300.37, entitled "Certification of Compliance with State and Local Law," which the applicant must complete and sign under penalty of perjury. *See* 27 C.F.R. § 478.47(b)(6). In this case, all are agreed that Plaintiff provided the requisite certification in support of his 2003 application for renewal of his FFL. (*See* Admin. Record at 7.)[7]

The applicant's own certification is not the end of the matter, however. Rather, under a regulation promulgated by the Defendant agency, the Chief of the BATF's National Licensing Agency is directed to determine "through further inquiry or investigation, or otherwise," whether an applicant has established his

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[7] To be accurate, the record does not appear to include a completed ATF Form 5300.37 in support of Plaintiff's 2003 renewal application. Instead, the record contains Plaintiff's response on a "Renewal Application Questionnaire," attesting under penalty of perjury that the firearms activity to be conducted at his home was not prohibited by State or local law. (Admin. Record at 7.) Defendant does not contend that Plaintiff failed to submit any required certification in support of his 2003 application, nor does the agency cite any such failure as a ground for denying this application.

While the record is perhaps incomplete as to Plaintiff's most recent application, it does include certifications of compliance in support of Plaintiff's 1994 and 2000 license renewals. (*See id.* at 56, 87.) Interestingly, the record also reflects Plaintiff's ***affirmative*** response in 1994 to the question whether any zoning ordinances prohibited the conduct of a firearms business at his Redford Township home. (*See id.* at 48.) Plaintiff evidently changed this answer from "yes" to "no" upon the advice of attorney Randall A. Pentiuk that he should do so. (*See id.* at 64.)

entitlement to an FFL by satisfying the statutory criteria for such a license. 27 C.F.R. § 478.47(a). Pursuant to this regulation, "[t]he ATF's National Licensing Center has the responsibility to investigate and ensure that an applicant for a license is qualified," and this encompasses the "duty to ensure the truthfulness of statements made on an application for a federal firearms license." *Fattahi v. Bureau of Alcohol, Tobacco & Firearms*, 195 F. Supp.2d 745, 747 n.5 (E.D. Va. 2002), *aff'd*, 328 F.3d 176 (4th Cir. 2003).

As part of its "inquiry or investigation" in this case, the Defendant agency contacted Redford Township officials and was advised that Plaintiff's operation of a firearms business from his home in an area zoned as R-1 residential would contravene the Township's zoning ordinance. (*See* Admin. Record at 99-102.) Specifically, in a September 23, 2003 letter to Redford Township's Director of Public Services, Leo Snage, which in turn was forwarded to the BATF, Township counsel Owen J. Cummings stated:

> I spoke at length on Friday, September 19th, with Gail Sullivan of the Bureau of Alcohol, Tobacco and Firearms. I have indicated to Ms. Sullivan that it is the position of the Zoning Administrator in Redford Township that the sale of firearms from a home in a residential district is not a permitted use in Redford Township. In doing so, I indicated to Ms. Sullivan that the Zoning Administrator pointed out to me that a home occupation is contained under the definitions of accessory use. A[n] "accessory use" is a use which is clearly incidental to, customarily found in connections

with, and (except in the case of accessory off-street parking spaces or loading) located on the same zoning lot as, the principal use to which it is related.

It is obvious that the sale of small arms is not customarily found in connection with the use of residential premises. That ordinance goes on to speak to accessory uses and listing some. Under that listing, no. 5 is that of home occupations, consisting of an occupation or profession carried on by not more than one (1) member of the family residing in the residence and requiring no structural change or alteration which would diminish the residential character of the dwelling and/or residence.

Sale of goods from a home is not a home occupation. Historically, home occupations were that of seamstress, laundress, piano teachers, dentistry and other single practitioner-type of professional persons.

Ms. Sullivan asked me if the Township would continue to take this position in the event that an applicant would ask for a hearing on this request. I told Ms. Sullivan it is my understanding that the Township would participate with her Bureau in defending their position.

(*Id.* at 99.) In reliance on this opinion regarding Redford Township's zoning ordinance, Defendant denied Plaintiff's application for renewal of his FFL,

both initially and following an administrative hearing. (*See id.* at 11, 115.)

In support of his pending summary judgment motion, Plaintiff argues that the Township and its counsel "fabricated" a prohibition against sales that is nowhere to be found in the language of the Township zoning ordinance, and that Defendant was "wrong as a matter of law" in electing to rely upon "the Township's fabrication." (Plaintiff's Motion, Br. in Support at 7-9.) Regarding the former, Plaintiff begins with the proposition, as recognized by the Township's counsel in the above-quoted letter, that the Redford Township zoning ordinance permits "accessory uses" on property zoned as R-1 residential. (*See* Redford Township Zoning Ordinance, § 4.01(D).) The ordinance, in turn, defines "accessory uses" as follows:

> An "accessory use" is a use which is clearly incidental to, customarily found in connection with, and (except in the case of accessory off-street parking spaces or loading) located on the same zoning lot as the principal use to which it is related.

(*Id.* at § 1.02.) The ordinance then lists examples of accessory uses, including one that the parties agree is the most pertinent here: "[h]ome occupations, consisting of an occupation or profession carried on by not more than one (1) member of the family residing in the residence and requiring no structural change or alteration which would diminish the residential character of the dwelling and/or residence." (*Id.*) Plaintiff contends that the Township and its counsel impermissibly went beyond this plain language by

limiting "home occupations" to those that "[h]istorically" have been performed in private residences, and by flatly precluding any occupations that entail the sale of goods.

Yet, before the Court may reach this question as to the proper construction of the Redford Township zoning ordinance, Plaintiff first must identify a legal basis for the Court to do so. Unfortunately, Plaintiff's written submissions largely fail to acknowledge this concern, much less suggest an answer. At oral argument, however, Plaintiff asserted that the Court's power to independently construe local zoning law is inherent in the "de novo" review called for under the federal firearms statute, 18 U.S.C. § 923(f)(3). Plaintiff reasons that this Court's "de novo" review must entail a wholly independent inquiry whether he has satisfied the various prerequisites for license renewal, including the requirement that his firearms business not be "prohibited by State or local law in the place where the licensed premises is located." 18 U.S.C. § 923(d)(1)(F)(i). This independent inquiry, in Plaintiff's view, necessarily must encompass a "de novo" determination whether local law, properly construed, permits or forbids the operation of such a business from the licensed premises.

The Court perceives two separate problems with Plaintiff's understanding of the "de novo" review authorized by the federal firearms statute. First, even assuming, for the moment, that the Defendant agency's decision, underlying reasoning, and license approval process were wholly immaterial to this Court's review, it would be highly unusual for this Court to determine what state or local law forbids

without regard for, and due deference to, the views of state and local authorities on the subject. In the ordinary course of its rulings on matters of state law, for example, this Court must defer to the decisions of the state's highest court, and generally will follow the decisions of inferior state courts unless convinced that the state's highest court would rule otherwise. *See Ziebart International Corp. v. CNA Insurance Cos.*, 78 F.3d 245, 250-51 (6th Cir. 1996). Thus, the concept of "de novo" review does not confer upon this Court the freestanding authority to decide for itself what a state or local enactment might allow or prohibit. Rather, as a starting point, at least, the Court would consult the very same source that the Defendant agency looked to in this case — namely, the local authorities. All other things being equal, then, as between Plaintiff's reading of the Redford Township zoning ordinance and the interpretation advanced by the Township's zoning administrator and attorney, the latter ordinarily would be entitled to greater weight. Plaintiff has failed to even acknowledge this usual rule, much less suggest why it should not apply here.

Next, and more importantly, the Court already has observed that its "de novo" review is limited by statute to the question whether the Defendant agency's denial of Plaintiff's application was "authorized." 18 U.S.C. § 923(f)(3). Plainly, this inquiry is different from — and, as the courts have explained, considerably narrower than, *see, e.g.*, *Pinion Enterprises*, 371 F. Supp.2d at 1315 — the question whether the agency's decision was "correct" under a court's entirely independent assessment of the record and the pertinent federal, state, and local law. Thus, it does not matter whether this Court, in its independent

judgment upon conducting its own analysis, would agree with, adopt, or favor Plaintiff's reading of the Redford Township zoning ordinance over the construction advanced by Township officials. It matters only whether Defendant was "authorized" to proceed as it did — namely, by soliciting the views of Township officials regarding the lawfulness of operating a firearms business from a home in an R-1 residential district, and by acting in reliance on the opinion provided in response to this inquiry.

To the extent that Plaintiff even hints at the possible criteria that the Defendant agency must satisfy to reach an "authorized" decision, he appears to suggest that the agency has at least some duty in each and every case to independently analyze and "confirm . . . the accuracy" of a local government official's interpretation of local law. (Plaintiff's Motion, Br. in Support at 8.) In the Court's view, however, such a proposed rule goes too far. Just as this Court defers to the state courts and other relevant authorities as to issues of state and local law, the Defendant agency surely should be permitted to do so as well. If, for example, Michigan's highest court had issued a decision construing an ordinance that was materially indistinguishable from the Redford Township ordinance at issue here, the Defendant agency surely could have permissibly relied upon this definitive statement of the law without need for further inquiry or analysis. Indeed, if the agency were to proceed otherwise and construe the ordinance in a manner contrary to a ruling of the Michigan Supreme Court, it certainly could be said that the agency acted in an "unauthorized" manner by disregarding a state court's considered judgment on a matter of state law and

arrogating to itself the function of deciding what state or local law permits or forbids.

To be sure, the legal opinion upon which Defendant relied in this case is a good deal less definitive than a state court ruling. Yet, Plaintiff fails to suggest what steps Defendant might have taken to secure a "better" or more definitive interpretation of the Redford Township zoning ordinance — beyond, of course, merely accepting ***his*** proposed construction. In particular, Plaintiff has not identified any avenue for the BATF to seek an administrative or judicial construction of the ordinance by some local or state agency or court. Rather, Plaintiff apparently wishes to impose upon Defendant the obligation to perform some sort of independent legal analysis, at least in cases where, in his judgment, the opinion provided by a local government official is deficient on its face. Given Plaintiff's willingness to ascribe malignant motives to the Defendant agency, (*see, e.g.*, Plaintiff's Motion, Br. in Support at 11 & n.6 (accusing Defendant of pursuing the "political goal of simply reducing the number of federal firearms licensees" by "collud[ing] with local governments to deny valid applications")), it is not clear why he believes that such an independent agency analysis would be preferable to the course pursued by Defendant in this case. In any event, the Court finds no basis for concluding that Defendant's chosen method of ascertaining the meaning of the Redford Township zoning ordinance was "unauthorized," and hence provides a ground for overturning Defendant's denial of Plaintiff's application for renewal of his FFL.

In contrast, and as Defendant points out, Plaintiff ***did*** have legal avenues available to him for challenging the correctness of the opinion produced by Redford Township officials in response to Defendant's inquiry. Under Michigan's Township Zoning Act, any township that enacts a zoning ordinance must appoint a "township board of appeals," Mich. Comp. Laws § 125.288(1), and this body, in turn, has the duty to "hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official or body charged with enforcement of an ordinance adopted pursuant to" the Act, Mich. Comp. Laws § 125.290(1). While Plaintiff complains that the Township failed at various points in the past to respond to his requests for a written statement of its opinion regarding the proper interpretation of its zoning ordinance, it is clear that the Township ***did*** provide such a written opinion in connection with Plaintiff's most recent renewal application.[8] It does not appear that Plaintiff has made any effort to appeal this determination to the Redford Township board of appeals, and neither has he suggested any reason why he could not do so. Having failed to pursue this available avenue for

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[8] The Township's past failures to provide written confirmation of its views are irrelevant here, of course, where Plaintiff's past applications for renewal of his FFL were ***approved*** despite the verbal statements of Township officials that his operation of a firearms business from his home violated the Township's zoning ordinance. Indeed, according to Defendant, these past approvals were based, at least in part, upon Defendant's inability to identify any documentary proof of the Township's position regarding Plaintiff's compliance or non-compliance with the zoning ordinance.

demonstrating the error in the Township's interpretation of its zoning ordinance, Plaintiff cannot be heard to complain that the Defendant agency accepted this interpretation as the most recent and definitive word on the subject.

In the end, Plaintiff merely invites the Court to accept his reading of the Redford Township zoning ordinance as purportedly more faithful to the plain language of this enactment. As explained, however, this is not the question before the Court. Rather, if Defendant's decision was "authorized" under the terms of the federal firearms licensing statute, then the Court's inquiry is at an end. Implicit in the Defendant agency's power to grant or deny FFL applications is the authority to inquire and investigate whether an applicant has satisfied all of the statutory requirements for a license — and, as noted, this investigative duty is made explicit in the BATF regulations adopted in the exercise of the agency's statutory authority. *See* 27 C.F.R. § 478.47(a). The agency surely is due some deference in determining the appropriate means of investigating an applicant's compliance with the statutory requirements for an FFL, and Plaintiff has not explained, beyond his unsupported and wholly speculative claims of hidden agendas and collusion, how Defendant might have abused this discretion by soliciting the views of Township officials regarding the proper meaning of a Township ordinance.

Conceivably, there could be cases where a local official's representations as to local law might be so implausible, unreasoned, arbitrary, or inconsistent with the language of an underlying enactment as to

defeat any claim of reasonable reliance. The opinion at issue here, however, was provided by an attorney, supported by citation to the language of the ordinance, and accompanied by at least some explanation of the reasoning that led to counsel's conclusion. Under these circumstances, the Court finds that Defendant was "authorized" to rely upon this opinion as a basis for concluding that Plaintiff's operation of a firearms business from his Redford Township residence was "prohibited by . . . local law in the place where the licensed premises is located." 18 U.S.C. § 923(d)(1)(F)(i).

C. Redford Township's Zoning Ordinance, as Construed by Township Officials, Is Not Preempted by Mich. Comp. Laws § 123.1102.

Apart from asserting that the interpretation of the Redford Township zoning ordinance by Township officials was wrong, Plaintiff also contends that this interpretation ran afoul of a Michigan statute, Mich. Comp. Laws § 123.1102, that limits the ability of local governments to regulate the ownership, sale, or possession of firearms. Again, this argument presumes that the Defendant agency was obligated to engage in this sort of state-law preemption analysis as part of its determination whether Plaintiff's operation of a firearms business from his home was prohibited by local law, as opposed to merely relying on the opinions of local officials and leaving Plaintiff to pursue any appeals or other remedies that might be available under Michigan law to challenge a township's construction of its zoning ordinance. And, of course, Plaintiff's argument also rests on the premise that Defendant's failure to engage in this sort of state-law

preemption analysis resulted in an "unauthorized" decision that may be overturned by this Court. Yet, even accepting these premises, for present purposes only, the Court readily concludes that Plaintiff's claim of preemption lacks merit.

The Michigan statute which, in Plaintiff's view, preempts the Township's proffered construction of its zoning ordinance provides as follows:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

Mich. Comp. Laws § 123.1102. Plaintiff contends that Redford Township's zoning ordinance, as construed by Township officials, runs afoul of this statute by regulating — and, in fact, outright prohibiting — the sale of firearms from premises located in R-1 residential districts.

As Plaintiff recognizes, Chief Judge Friedman of this District rejected this same argument under facts and circumstances that are materially indistinguishable from those presented here. In *Yenson v. United States Dep't of Treasury*, No. 98-70262 (E.D. Mich. Jan 26, 1999), the defendant BATF denied the plaintiff's application for renewal of his

FFL on the ground that his operation of a firearms business from his private residence in St. Clair Shores, Michigan, was prohibited by the city's zoning ordinance.[9] The plaintiff in that case, like Plaintiff here, argued that the city's zoning ordinance impermissibly regulated the sale of firearms in violation of Mich. Comp. Laws § 123.1102. In an unpublished decision, Judge Friedman rejected this claim of preemption:

> The ordinance at issue in this case is a zoning ordinance, pure and simple. The ordinance does not seek to regulate the purchase or sale of firearms, nor does it have this effect. Rather, the ordinance prohibits all uses in residential areas except those specifically permitted; and no commercial activities are authorized in such areas except libraries, parks, recreational facilities, golf courses, cemeteries, and temporary construction buildings. The incidental effect of the ordinance — i.e., that plaintiff may not operate his business within an R-A [one-family residential] zone — does not conflict with the state statute . . . .
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> * * * *
>
> In the present case, it is quite clear that the zoning ordinance is not preempted. The statute prohibits local units of government from regulating "the ownership, registration,

[9] Notably, Plaintiff served as counsel for the plaintiff in that case.

purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition . . . or components of pistols or other firearms . . . ." The St. Clair Shores zoning ordinance imposes no such regulations. Rather, the ordinance simply limits, in a generally applicable manner, the types of uses which are permitted in residential areas. The incidental effect of this ordinance is to prevent plaintiff's business (and all other businesses which are not specifically included among the small number of "principal uses permitted") from operating within R-A zones. This effect is the same as that of the zoning ordinances in [several prior Michigan cases], in which the ordinances survived preemption challenges. The St. Clair Shores ordinance is not directed at firearms, but instead applies generally in prohibiting most commercial activity within residential zones. Plaintiff does not contend that St. Clair Shores has zoned firearms dealers out of existence by zoning the entire city "residential" or that he could not conduct his business in compliance with the zoning ordinance by operating from within a commercially zoned area. While the zoning ordinance in this case may have an indirect effect upon plaintiff's business, the same could be said of the local building codes or local property tax assessments. If plaintiff's preemption argument were carried out to its logical conclusion, any ordinance with any effect on a firearms business would be preempted as well. The court cannot imagine that the Michigan legislature intended such an absurd result.

Yenson, slip op. at 6-9.

In so ruling, the court relied on a line of Michigan Supreme Court preemption decisions that have distinguished between a municipality's direct attempt to enter into a field of regulation occupied by a state statutory scheme and a municipal enactment that has only an indirect effect upon the subject matter addressed in a state regulatory scheme. *In People v. Llewellyn*, 401 Mich. 314, 257 N.W.2d 902, 903 (1977), for example, the Michigan Supreme Court held that a local anti-obscenity ordinance was preempted by a "comprehensive" state statutory scheme regulating this same subject area. In so ruling, the court stated that "[a] municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *Llewellyn*, 257 N.W.2d at 904 (footnotes with citations omitted). The court then concluded that the local anti-obscenity ordinance at issue ran afoul of the second of these forms of preemption, as it reflected the municipality's attempt to enter a field occupied by a broad state statutory scheme. 257 N.W.2d at 906-08.

Nonetheless, the court emphasized an important limit to its holding:

> . . . [W]e do not mean to suggest in this opinion that a municipality is preempted from enacting ordinances outside the field of regulation occupied by the state statutory

> scheme governing criminal obscenity. For example, there is not the slightest indication that the state Legislature acted in [the state anti-obscenity statute] to preclude local zoning ordinances governing the location of establishments featuring "adult entertainment" such as that recently approved by the United States Supreme Court in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).
>
> The Detroit ordinance challenged in *Young* involved zoning, not criminal prohibition, and "adult establishments" featuring erotica not defined in terms of obscenity. Clearly, then, such municipal regulation is outside of the state's present statutory scheme governing criminal obscenity. In addition, the need for uniformity which has been in part the foundation of our opinion today has little relevance to such zoning ordinances, which speak to a significant local need to regulate the location of "adult establishments" and which are primarily local in their effect.

257 N.W.2d at 908-09 (footnote omitted).

Judge Friedman's opinion in *Yenson* also discussed the Michigan Supreme Court's ruling in *City of Howell v. Kaal*, 341 Mich. 585, 67 N.W.2d 704 (1954), in which the defendant property owners advanced various challenges to a municipal ordinance that precluded them from operating a trailer park on land zoned as R-A (residential agricultural). Among other arguments, the defendants contended that this zoning ordinance

was preempted by a state statutory scheme providing for the licensing and regulation of trailer parks. The Michigan Supreme Court disagreed:

> The substance of the holdings in [three prior Michigan Supreme Court cases] is to the effect that a city ordinance in conflict with a statute is to that extent invalid, that an ordinance may not invade a field completely occupied by statute but may enter an area not pre-empted by the state act, [and] that what the state law expressly permits an ordinance may not prohibit . . . . The zoning ordinance here in question does not undertake to license, regulate or prohibit trailer coach parks. They are permitted in three zones in the city . . . . The zoning ordinance and its provisions zoning defendants' property as R-A are not in conflict with the statute and do not invade an area occupied by it.

Kaal, 67 N.W.2d at 707; *see also Gackler Land Co. v. Yankee Springs Township*, 427 Mich. 562, 398 N.W.2d 393, 400-01 (1986) (rejecting a claim that a zoning ordinance restricting mobile or manufactured homes to mobile parks was preempted by federal and state statutes establishing construction and safety standards for manufactured homes, and reasoning that these enactments did not conflict because "[t]he requirements of the zoning ordinance in the case at bar are not standards regulating the construction and safety of mobile homes" but instead "have for their purpose the regulation of where mobile homes may be placed and under what conditions").

As Judge Friedman reasoned in *Yenson*, this line of Michigan Supreme Court precedent militates strongly against the preemption argument advanced in that case (and again by Plaintiff here). There is no question that, through the enactment of Mich. Comp. Laws § 123.1102, the Michigan Legislature meant to occupy the field of firearms regulation and preclude local governments from entering into this area. Yet, as the Michigan Supreme Court has repeatedly recognized, zoning ordinances of general application which merely regulate the ***location*** of certain categories of businesses, activities, or dwellings are not properly viewed as "entering into" an underlying substantive field of regulation governing a particular type of business, activity, or dwelling — *e.g.*, adult entertainment (in *Llewellyn*), trailer parks (in *Kaal*), or mobile homes (in *Gackler Land Co.*). Accordingly, this Court agrees with Judge Friedman that the zoning ordinance at issue here, like the one under consideration in *Yenson*, is not preempted by Mich. Comp. Laws § 123.1102 as "pertaining to . . . or regulat[ing]" the purchase or sale of firearms merely because it prohibits the operation of a firearms business (as well as all other business activities outside the scope of "home occupations") on land zoned as R-1 residential.

Nonetheless, apart from noting that this Court is not bound to follow *Yenson*, Plaintiff insists that Judge Friedman's ruling in that case has been undermined by subsequent Michigan court decisions. In particular, Plaintiff relies on the recent ruling in *Michigan Coalition for Responsible Gun Owners v. City of Ferndale*, 256 Mich. App. 401, 662 N.W.2d 864, 866 (2003), in which the Michigan Court of Appeals held

that Mich. Comp. Laws § 123.1102 preempted a City of Ferndale ordinance banning the possession or concealment of weapons in municipal buildings. In so ruling, the court first found that § 123.1102 triggered the second form of preemption cited by the Michigan Supreme Court in *Llewellyn*, *supra*, in that it expressly and completely occupies the field of firearms regulation "to the exclusion of local units of government." *Michigan Coalition*, 662 N.W.2d at 871-72. The court then stated:

> In the present case, it is readily apparent that the Ferndale ordinance regulates areas that § 1102 expressly prohibits. Section 1102 provides that a local unit of government shall not enact an ordinance pertaining to the transportation or possession of firearms, but the city of Ferndale [ordinance] does just that. Despite the clear language of the Legislature, amicus curiae contends in a conclusory fashion that § 1102 should not preempt ordinances like the Ferndale ordinance because the statute "is not clearly aimed at municipal control of activities within the confines of its own public buildings." However, the language of § 1102 is broad and all-encompassing. A state statute that prohibits a local unit of government from enacting "any ordinance or regulation" or regulating "in any other manner" the transportation or possession of firearms cannot reasonably be interpreted to exclude local ordinances that address the carrying of firearms in municipal buildings.

662 N.W.2d at 872.

Michigan Coalition is readily distinguishable, and does nothing to undermine Judge Friedman's or this Court's reliance on the line of Michigan Supreme Court cases recognizing that zoning ordinances typically cannot be viewed as "entering into" substantive fields of regulation governing specific types of businesses, activities, or dwellings. The municipal ordinance at issue in *Michigan Coalition* specifically and expressly regulated firearm possession, and the Michigan Court of Appeals merely observed that this explicit attempt at firearms regulation was not saved by its narrow limitation to municipal buildings. Here, in contrast, Redford Township's zoning ordinance says ***nothing at all*** about firearm possession, ownership, purchase, sale, or any other form of firearms regulation, but merely has, at most, an indirect effect upon firearms transactions by limiting firearms businesses (and all other comparable businesses that do not constitute "home occupations") to certain portions of the Township and excluding them from others. As Judge Friedman held in *Yenson*, such an ordinance does not impermissibly "enter into" the field of firearms regulation that the Michigan Legislature completely occupied through its enactment of § 123.1102.

Thus, even assuming that the Michigan Court of Appeals had the authority to overturn the above-cited Michigan Supreme Court precedent — and it plainly does not — there is no inconsistency whatsoever between the ruling in *Michigan Coalition* and the preemption decisions in *Llewellyn*, *Kaal*, and *Gackler Land Co.* Consequently, the more recent *Michigan Coalition* decision provides no basis for this Court to deviate from Judge Friedman's well-reasoned ruling in

Yenson that § 123.1102 does not preempt a local zoning ordinance that prohibits the operation of a firearms business (and other comparable business activities) on land zoned as residential.[10]

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[10] Although Plaintiff cites two other recent Michigan court rulings as purportedly undermining the decision in *Yenson*, neither merits extended discussion. First, the ruling in *Frens Orchards, Inc. v. Dayton Township Board*, 253 Mich. App. 129, 654 N.W.2d 346, 350 (2002), contributes nothing to the Court's inquiry here, where the court in that case found that the state statutory scheme cited by the plaintiff was "not so pervasive that it would support a finding of preemption." Here, in contrast, the Court does not in any way deny the preemptive effect of § 123.1102, but simply concludes that the Redford Township zoning ordinance does not enter into the field occupied by this state statute. Next, while Plaintiff cites *Mack v. City of Detroit*, 467 Mich. 186, 649 N.W.2d 47, 52 (2002), for the proposition that a municipality's power to enact ordinances is subject to and limited by the Michigan Constitution and state statutes, this same principle was expressly recognized in *Llewellyn*, 257 N.W.2d at 904, and indeed was the starting point of the court's discussion of preemption in that case.

Finally, the Court deems it necessary to touch only briefly upon Plaintiff's contention that Redford Township officials "entered into" the field of firearms regulation that the state reserved to itself in § 123.1102 by deliberately construing the Township's zoning ordinance in a way that was intended to sharply limit the number of firearms businesses operating within the Township. First, Plaintiff has failed to cite any authority in support of his novel theory that a municipal ordinance may be preempted by virtue of how it is applied in a particular case, as opposed to on the basis of what the ordinance actually says. It also is noteworthy that Plaintiff has not identified any inconsistent application of the ordinance by Township officials — there is no evidence, for example, that the Township has construed the ordinance's "home occupation" language more broadly in other

D. The Additional Reasoning that Was Erroneously Included in the Defendant Agency's Final Decision Does Not Give Rise to a Due Process Violation for Which Relief Is Warranted.

As his next ground for seeking the reversal of the Defendant agency's decision denying his application to renew his FFL, Plaintiff contends that Defendant violated his right of due process by addressing an issue in its final decision that was never before raised by either party throughout the course of the administrative proceedings. Under these circumstances, Plaintiff argues that he lacked notice of or a reasonable opportunity to challenge at least one of Defendant's grounds for denying his application. While the Court agrees that Defendant's final decision is erroneous in this regard, it cannot agree that this constitutes a due process violation or otherwise warrants any award of relief, where Defendant readily acknowledges its error and has demonstrated to the Court's satisfaction that its decision is independently supportable on a ground of which Plaintiff was amply aware.

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cases to permit other sorts of businesses to operate out of residences. Finally, and most importantly, the Court again reminds Plaintiff that it is the decision of the ***Defendant agency*** that is under review here. Plaintiff has not suggested any basis for the Court to impose upon Defendant the duty to ferret out any purportedly improper motives or hidden agendas that might lurk behind a local official's statement of what local law permits or forbids.

As is evident from the parties' briefs and the administrative record, the success of Plaintiff's renewal application hinged upon the question whether his operation of a firearms business from his home was prohibited by Redford Township's zoning ordinance. This was the sole issue addressed in the Defendant agency's initial notice of its decision denying Plaintiff's application, (*see* Admin. Record at 10-11); it was the sole issue addressed in Plaintiff's subsequent request for an administrative hearing, (*see id.* at 15-16); it was the sole focus of the evidence and testimony presented at the ensuing administrative hearing; and it was the sole issue addressed in the hearing officer's report recommending that Plaintiff's application be denied, (*see id.* at 106-10.) Yet, in its final decision issued on July 21, 2005 the Defendant agency not only found that Plaintiff's operation of a firearms business from his home violated the Redford Township zoning ordinance, but ***also*** concluded that Plaintiff had willfully violated the Gun Control Act by maintaining a business that he purportedly knew to be in violation of the Township ordinance. (*See id.* at 115-17.) Such a willful violation provides a separate basis for revoking a federal firearms license, but only after the licensee is given "notice and opportunity for hearing." 18 U.S.C. § 923(e). As Plaintiff correctly points out, Defendant gave no such "notice and opportunity for hearing" here, where the issue of willful violation was never raised or addressed in the course of the administrative proceedings.

Be that as it may, the Court sees no benefit to analyzing this matter under generalized due process principles, where the very same statutory provision

that confers a right of judicial review, 18 U.S.C. § 923(f)(3), also grants this Court sufficiently broad 29 authority to both address the Defendant agency's transgression and fashion an appropriate remedy. First, and as discussed at length earlier, this provision directs the Court to determine whether "the Attorney General was . . . authorized to deny the application." 18 U.S.C. § 923(f)(3). This Court readily concludes, and other courts have found, that an unsupported finding of a "willful violation" would be subject to reversal under this provision. *See, e.g., Rich v. United States*, 383 F. Supp. 797, 801-02 (S.D. Ohio 1974) (setting aside the revocation of a license where the evidence established only negligence and not a willful violation). In this case, it can hardly be said that the Defendant agency met its burden of establishing a willful violation, where it did not even attempt such a showing throughout the course of the administrative proceedings.

In this event, where at least one aspect of a decision by the Defendant agency is deemed to be unsupported, and hence "not authorized," § 923(f)(3) dictates that "the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court." Yet, while Plaintiff goes on at length about the lack of notice and opportunity to address the Defendant agency's spurious finding of a willful violation, he notably fails to offer any sort of cogent argument as to a suitable remedy for this error. Rather, he merely asserts in wholly conclusory fashion that the Court should declare Defendant's final decision "void" and "refus[e] to enforce [Defendant's] license denial." (Plaintiff's Motion, Br. in Support at 19.)

The Court finds that the remedies proposed by Plaintiff are neither necessary nor appropriate to attain compliance with the Court's judgment in this case. If it could be said here that Defendant's decision was unsupported, and thus "not authorized," absent a finding of a willful violation, then it would be appropriate to set aside the decision and either order that a license be granted or, perhaps, order a remand for further proceedings. Yet, as is evident from the Court's rulings in this opinion, there exists a wholly separate and independent ground upon which to conclude that Defendant's denial of Plaintiff's application was "authorized." In particular, and as both parties clearly recognize, Defendant's initial decision rested in its entirety, and its final decision rested in part, upon the ground that Plaintiff's operation of a firearms business from his home violated the Redford Township zoning ordinance. Plaintiff cannot complain that he lacked notice and an opportunity to be heard as to this ground for Defendant's decision — to the contrary, his claim of a due process violation is entirely predicated on the fact, and it is likewise evident from the administrative record, that this was the principal (if not sole) focus of the evidence offered and arguments made in the course of the administrative proceedings. In addition, this is the main (and first) issue raised in Plaintiff's complaint and addressed in his summary judgment motion.

Under these circumstances, the Court fails to see how any award of relief is warranted to address Defendant's erroneous inclusion of willfulness findings in its final decision. Defendant has freely acknowledged this error, and has evidently sought,

albeit without success, to secure Plaintiff's agreement upon a stipulation providing that Plaintiff's application was denied solely on the basis that his operation of a firearms business from his home was not in compliance with local law. (*See* Defendant's Motion, Br. in Support at 6-7 n.4.)[11] Indeed, in a filing under Fed. R. Civ. P. 26(f) in the very early stages of this case, Defendant stated that it would "not be arguing 'willfulness' as a basis for denial in this case." (*See* 11/30/2005 Rule 26(f) Conference Report & Discovery Plan at 2.) Accordingly, Plaintiff was not prejudiced or otherwise harmed by Defendant's error, and no remedy is warranted.

E. Defendant Is Entitled to Summary Judgment in Its Favor on the Remaining Constitutional Claims and Theories Advanced in Plaintiff's Complaint.

Apart from seeking judicial review and reversal of Defendant's denial of his renewal application under 18 U.S.C. § 923(f)(3), and apart from the due process theory addressed above, Plaintiff has asserted two or perhaps three additional claims in his complaint, in which he evidently advances other constitutional theories for overturning the challenged decision in this case. While Plaintiff's summary judgment motion is silent on these additional claims, Defendant's motion

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[11] Having failed to secure such an agreement, Defendant instead sent Plaintiff a letter on May 16, 2006, clarifying that its denial of his renewal application was based solely upon his business's lack of compliance with local law, and not on any finding of a willful violation. (*See*Defendant's Response to Plaintiff's Motion, Ex. C.)

endeavors to construe them and argues that each of these constitutional claims is lacking in merit. In his response, Plaintiff addresses only two such constitutional theories, evidently abandoning any remaining claims that he might have asserted in his complaint. As discussed below, the Court readily concludes that neither of the two theories addressed by Plaintiff in his summary judgment submissions provides a legally viable basis for disturbing Defendant's decision.

Plaintiff first contends that the federal firearms licensing statute represents an invalid exercise of congressional power under the Commerce Clause, at least to the extent that it requires applicants to certify that the operation of a firearms business on the licensed premises comports with state and local law. *See* 18 U.S.C. § 923(d)(1)(F)(i). Plaintiff does not dispute, nor could he, that Congress has acted consistently with its Commerce Clause power by mandating that firearms dealers be properly licensed. *See, e.g., United States v. Day*, 476 F.2d 562, 565-67 (6th Cir. 1973); *Mandina v. United States*, 472 F.2d 1110, 1113-14 (8th Cir. 1973); *United States v. Boone*, 904 F. Supp. 868, 869-70 (N.D. Ind. 1995), *aff'd*, 108 F.3d 1380, 1997 WL 117266 (7th Cir. Mar. 6, 1997). Rather, Plaintiff maintains that ***one specific aspect*** of this federal licensing scheme — namely, the requirement that an applicant certify conformity with state and local law — exceeds congressional power under the Commerce Clause.

As Defendant correctly observes, the ruling cited by Plaintiff, *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), is simply inapposite to his

constitutional challenge here. Having conceded, as he must, that Congress has the power to enact a licensing scheme for firearms dealers, his constitutional challenge to a particular ***element*** of this statutory scheme can succeed only if he can show that this specific aspect of the means chosen by Congress to regulate firearms dealers is not "reasonably adapted to the end permitted by the Constitution." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 101 S. Ct. 2352, 2360 (1981) (internal quotation marks and citations omitted). Plaintiff has not even attempted such a showing here. To the contrary, he expressly acknowledges in his complaint that the government has a "legitimate interest in ensuring compliance with local and state law." (Complaint at ¶ 56.) The legitimate interest served by this requirement is likewise evident to the Court, as Congress reasonably could have sought to minimize any potential friction between federal and local authorities by ensuring that the federal government licenses only those firearms businesses that conform to state and local law.[12] Accordingly, the Court rejects Plaintiff's Commerce Clause challenge.

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[12] Given this evident purpose behind the requirement that an applicant certify his compliance with state and local law, it is absurd to contend, as Plaintiff does here, that this requirement impermissibly "usurp[s] . . . historically local functions such as zoning." (Plaintiff's Response to Defendant's Motion at 18.) To the contrary, the federal statutory scheme would be far more likely to usurp the zoning authority of local governments if it granted licenses, and thus the imprimatur of federal law, to businesses that failed to comport with local zoning ordinances.

This leaves only Plaintiff's claim that the federal licensing scheme for firearms dealers, at least as it has functioned in this case, impermissibly co-opts state and local authorities by soliciting their views as to whether the operation of a firearms business at a particular location would comport with state and local law. In support of his muddled argument on this point, Plaintiff cites *Printz v. United States*, 521 U.S. 898, 933, 117 S. Ct. 2365, 2383 (1997), in which the Supreme Court relied on principles of federalism and separate state sovereignty to hold that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."

Even Plaintiff himself must acknowledge the obvious distinction between the statutory scheme at issue in *Printz* (the Brady Handgun Violence Protection Act) and the procedure employed by the Defendant agency in this case. The lynchpin of the Court's analysis in *Printz* was that the challenged statute ***compelled*** the participation of state and local officials. Here, in contrast, the Defendant agency merely ***requested*** that Redford Township officials offer their opinions as to the proper interpretation of the Township's zoning ordinance, and those officials ***voluntarily*** agreed to do so. Having recognized this obvious distinction, Plaintiff falls back on the argument that a Michigan statute, Mich. Comp. Laws § 123.1102, prohibits local officials from even ***voluntary*** participation in the federal licensing process, as this would constitute impermissible "firearms regulation" that Michigan law reserves solely to the state. The Court already has addressed (and rejected) this state-law preemption argument, and sees no need to revisit this analysis here,

particularly in the guise of a federal constitutional claim.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's May 8, 2006 motion for summary judgment is DENIED. IT IS FURTHER ORDERED that Defendant's May 8, 2006 motion for summary judgment is GRANTED.

s/Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: February 9, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on February 9, 2007, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager